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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DELBERT RAY COLLETT, Defendant and Appellant.	2d Crim. No. B175477 (Super. Ct. No. 2001006331) (Ventura County)

Delbert Ray Collett appeals the sentence imposed after a guilty plea to carjacking (Pen. Code, § 215, subd. (a)),[1] and grand theft person (§ 487, subd. (c)). He contends that the sentence for grand theft should have been stayed (§ 654), and that imposing consecutive sentences for the two offenses violated his Sixth Amendment right to a jury trial. (*Blakely v. Washington* (2004) 540 U.S. ___ [124 S.Ct. 2531].) We affirm.

FACTS AND PROCEDURAL HISTORY[2]

Laren Hesseltine was driving in Los Angeles late one night looking for a sexual encounter with another man. He picked up Collett who was walking on the street.

[1] All statutory references are to the Penal Code.

[2] The facts are taken from the probation report and preliminary hearing transcript.

They made two stops and then began driving towards Malibu on the Pacific Coast Highway. Hesseltine parked his car on the side of the road, and both men got out. Collett walked away to urinate. After returning, Collett's demeanor changed from friendly to threatening. Collett said he was going to tie Hesseltine up and put him in the trunk of the car.

The two men began fighting. During the fight, Collett took Hesseltine's car keys, but Hesseltine managed to retrieve the keys and throw them into the darkness. The fighting continued and Collett became more violent. Eventually, Collett was able to tie Hesseltine's hands and feet with a belt and rope. Collett then took Hesseltine's wallet, retrieved the car keys from where the keys had been thrown, and drove off in Hesseltine's car. The incident consumed between 45 minutes and an hour of time.

Collett was charged with carjacking and robbery (§ 211), and a prior conviction and prison term were alleged (§ 667.5). After an initial plea of not guilty, Collett agreed to a plea bargain wherein he pleaded guilty to carjacking and grand theft from the person of another, and admitted the prior conviction and prison term. The robbery count was dismissed. As part of the plea bargain, Collett acknowledged that the maximum prison sentence that could be imposed was 10 years 8 months.

Collett was sentenced to state prison for five years eight months, consisting of the five-year middle term for carjacking, plus a consecutive eight-month sentence for the grand theft.

DISCUSSION

No Section 654 Violation

Collett claims the sentence for grand theft should have been stayed pursuant to section 654. He argues that he assaulted the victim and took his wallet, car keys and car in a single occurrence with a single intent. Respondent does not address this contention, asserting instead that Collett's plea bargain prevents consideration of his argument. We conclude, however, that Collett's section 654 argument lacks merit, and that the evidence supports the trial court's imposition of separate sentences for the two offenses.

Section 654 prohibits multiple sentences where a defendant commits multiple offenses through acts that comprise an indivisible course of conduct with a single criminal intent and objective. (*People v. Ortega* (1998) 19 Cal.4th 686, 693; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) In particular, although a defendant may be convicted of both carjacking and robbery or theft based upon the same conduct, multiple punishment is barred if the defendant takes both the car and personal belongings from the victim in a single act that is not separated by time or place. (*Ortega*, at pp. 699-700; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419-420; see § 215, subd. (c).)[3] Conversely, separate punishment for each of multiple offenses may be imposed when the defendant has multiple criminal intents and objectives even if the offenses were part of an otherwise indivisible course of conduct. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196; *People v. Green* (1996) 50 Cal.App.4th 1076, 1084-1085.)

We review a trial court's factual determination of a defendant's intent and objective under the substantial evidence standard. (E.g., *People v. Green, supra,* 50 Cal.App.4th at p. 1085.) Also, when the court makes no express finding, we will presume a finding of multiple objectives and uphold the implied finding whenever it is supported by substantial evidence. (See *People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) Here, the probation report and preliminary hearing transcript provide substantial evidence supporting a finding that Collett committed the carjacking and theft with different intents and objectives, and through different acts separated in time. Accordingly, separate punishment for each offense is permissible under section 654. (See *Green,* at p. 1085 [carjacking separated in time and location from a robbery of personal property of the same person supported a finding that the taking of the purse and the vehicle were separate incidents].)

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[3] Section 215, subdivision (c) provides: "This section shall not be construed to supersede or affect Section 211 [robbery]. A person may be charged with a violation of this section and Section 211. However, no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211."

The evidence reveals several distinct criminal acts by Collett over the course of 45 minutes to an hour, including a physical assault, several threats, grappling over the car keys resulting in their being thrown, further fighting, tying up Hesseltine, taking the wallet, searching for the keys in the darkness, and driving off in Hesseltine's car to escape. Collett may have decided to take the car when he briefly held the keys during the fight, and later formed the intent to take Hesseltine's wallet as an afterthought. Or he may have formed the intent to take Hesseltine's wallet, and later decided that he needed to take the car as a means of escape from a secluded area many miles from his home, as well as a means to prevent Hesseltine from giving pursuit or contacting the police before Collett could leave the area. In either event, the evidence shows that Collett committed separate acts at separate times and with the separate objectives of theft and escape.

We reject respondent's contention that Collett waived his right to claim section 654 error. "By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record." (Cal. Rules of Court, rule 4.412(b); see also *People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Cole* (2001) 88 Cal.App.4th 850, 858-859.) A plea bargain for a maximum term, however, is not an agreement for "a specified prison term."[4]

In holding that a certificate of probable cause is not required to appeal a plea bargained sentence, our Supreme Court distinguished a bargain for a specified prison term from a bargain for a sentencing range. "When the parties negotiate a *maximum* sentence, they obviously mean something different than if they had bargained for a *specific* or *recommended* sentence. By agreeing only to a maximum sentence, the parties leave unresolved between themselves the appropriate sentence within the maximum.

[4] The issue is presently before the Supreme Court in *People v. Shelton*, review granted June 16, 2004, S124503.

That issue is left to the normal sentencing discretion of the trial court, to be exercised in a separate proceeding." (*People v. Buttram* (2003) 30 Cal.4th 773, 785.) Here, Collett bargained for a sentence within an allowable range with the understanding that he retained the right to argue that applicable sentencing statutes and rules compelled the court to impose less than the maximum term.

No Blakely Violation

Collett contends that the Sixth Amendment requires the jury to determine the facts relied on by a trial court in imposing consecutive sentences. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2537; see also *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738].) We disagree, and conclude that the imposition of consecutive sentences did not increase Collett's total sentence beyond the statutory maximum within the meaning of *Apprendi* and *Blakely*.[5]

In *Apprendi*, the Supreme Court concluded that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) *Blakely* states that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2537.) Although neither *Apprendi* nor *Blakely* concerned consecutive sentences, *Apprendi* indicated that the possibility of consecutive sentences was irrelevant to whether an enhanced sentence for one offense was constitutional. (*Apprendi,* at p. 474.) Here, Collett's total sentence did not exceed the combined statutory maximum for the two offenses, nor did his sentence for the carjacking or the grand theft exceed the middle term sentence for those individual offenses.

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[5] The issue of whether *Blakely* applies to consecutive sentences is currently before the California Supreme Court in *People v. Black*, review granted July 28, 2004, S126182. Pending the Supreme Court's determination, several appellate courts have held that *Blakely* does not apply to consecutive sentences. (E.g., *People v. Dalby* (2004) 123 Cal.App.4th 1083; *People v. Picado* (2004) 123 Cal.App.4th 1216; *People v. Jaffe* (2004) 122 Cal.App.4th 1559.) We find the reasoning of these cases to be persuasive.

We reject Collett's argument that, under section 669,[6] consecutive sentences could be imposed only upon the finding of additional factors as set forth in California Rules of Court, rule 4.425.[7] Section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) But, the decision is left to the court's discretion. There is a statutory presumption in favor of the middle term as the sentence, but no statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Under section 669, sentences are deemed to run concurrently when the sentencing court fails to make any determination, but this result reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the principle that a defendant should not be required to serve a sentence unless it has been imposed by a court. (*In re Calhoun, supra*, 17 Cal.3d at p. 82.) It does not create a presumption or other entitlement to concurrent sentencing. A defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but not a particular result.

Respondent argues that Collett waived or forfeited any *Blakely* claim by not raising the claim in the trial court. We reject this argument for the same reasons as we

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[6] Section 669 provides in pertinent part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. . . . [¶] . . . Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."

[7] California Rules of Court, rule 4.425 sets forth the criteria the trial court must consider in deciding whether to impose consecutive or concurrent sentences, and includes various aggravating and mitigating circumstances relating to the offenses.

have stated in several prior opinions. A defendant does not forfeit or waive a legal argument that was not recognized at the time of his sentencing.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Bruce A. Clark, Judge
Superior Court County of Ventura

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